

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| BEN ROTEN, | § | |
| | § | No. 108, 2010 |
| Defendant Below, | § | |
| Appellant, | § | |
| | § | Court Below: Superior Court |
| v. | § | of the State of Delaware, |
| | § | in and for Sussex County |
| STATE OF DELAWARE, | § | |
| | § | Cr. No. 0907011738 |
| Plaintiff Below, | § | |
| Appellee. | § | |

Submitted: August 25, 2010

Decided: October 4, 2010

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 4th day of October, 2010, on consideration of the parties' briefs, it appears to the Court that:

1) Ben Roten appeals his conviction, after a jury trial, of assault in a detention facility. Roten claims that the trial court erred in denying his motion for a mistrial, and declaring him an habitual offender. We find no merit to these claims, and affirm.

2) Roten and John Jordan were inmates at Sussex Correctional Institute, housed in the same tier, at the time of the incident. Jordan was repairing a broken wire on his ear bud by burning the coating off the wire. The repair process, which was not a

permitted activity, generated some smoke. Roten got angry because he thought the smoke would attract attention, and get Roten in trouble.

3) The two men argued, and Roten called out the offense that Jordan had committed. In response, Jordan said that Roten was in jail for beating up a woman. A short time after the argument, Roten came to Jordan's cell and threw a bucket of boiling water on him. Jordan managed to get away from Roten and found a guard who took him to the medical unit. Jordan was admitted to the Chester-Crozier Medical Center Burn Unit and treated for second degree burns on 15 percent of his body.

4) Twice during the trial, Jordan testified that he called out the fact that Roten was in jail for beating up a woman. Roten did not object the first time, but moved for a mistrial after Jordan repeated himself. The trial court denied the motion, but promptly instructed the jury to disregard that fact:

Ladies and gentlemen, there was an objection to Mr. Jordan's last comment. Yesterday and today Mr. Jordan told you why Mr. Roten is in jail I will tell you to completely disregard the reason why Mr. Roten is in jail. I will also tell you to completely disregard the fact that Mr. Roten is in jail. Both of those things are absolutely irrelevant and they cannot play any factor in your decision in this case.¹

¹ Appellant's Appendix, A-102.

5) We review the trial court’s denial of a motion for a mistrial for abuse of discretion.² Generally, an instruction to the jury will cure any prejudice from an improper comment. A mistrial should be granted only when there is no meaningful, practical alternative.³ We are satisfied that the curative instruction was a sufficient remedy in this case. The jury already knew that Roten had committed a crime, as he was incarcerated. In addition, the prior crime, beating a woman, was not very similar to the charged crime, throwing boiling water on a prisoner. Finally, this was not a close case. In addition to Jordan’s testimony, the State’s evidence included a letter Roten wrote to his girlfriend confessing that he “messed a guy up really bad . . . [he] threw boiling water on him.”⁴

6) Roten also argues that the process by which he was declared an habitual offender was flawed. First, he says that he was given insufficient notice that the State was moving to have him declared an habitual offender. Second, he argues that the trial court improperly shifted the burden of proof to Roten. Third, Roten claims that the State failed to prove, beyond a reasonable doubt, that he had three prior felony convictions.

² *Smith v. State*, 963 A.2d 719 (Del. 2008).

³ *Id.* at 722.

⁴ Appellee’s Appendix, B-25.

7) Roten's lack of notice claim fails because it is factually inaccurate. On the day originally scheduled for sentencing, the State indicated that it would be filing an habitual offender motion that day, and that it was unable to do so earlier in the week because the courts had been closed for three days due to snowstorms. The trial court, in its discretion, continued the sentencing, and considered the State's motion one week after it was filed. By statute, the State may file a motion to have a defendant declared an habitual offender at anytime after conviction and before sentencing.⁵ The State complied with the statute, and Roten had adequate notice.

8) Roten contends that the trial court improperly shifted the burden of proof to him. The record belies that claim. The State produced certified records from North Carolina to prove that Roten had two prior convictions in that state. Roten argued that one of those convictions was a juvenile adjudication. The certified records did not support that claim, as the date of the conviction established that Roten was 19 years old. The trial court found that the court records satisfied the State's burden of proof. Nonetheless, as a matter of discretion, the court allowed Roten to provide any evidence that would support his claim within a reasonable time after sentencing. The court was not shifting the burden of proof to Roten. It was simply allowing Roten to disprove what the State had established. Roten failed to do so.

⁵ 11 *Del. C.* § 4214 (b).

9) Finally, Roten argues that the North Carolina records relied on by the State to establish one of his prior convictions do not conclusively establish that he was convicted of a felony. Because Roten did not present this argument to the trial court, we review for plain error.⁶ The State submitted a transcript of Roten's plea, in which he swore that he was freely and knowingly entering a plea of no contest to "felony breaking and entering a motor vehicle and injury to personal property."⁷ There is nothing ambiguous about this evidence, and we find no plain error.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

By the Court:

/s/ Carolyn Berger

Justice

⁶ Sup. Ct. R. 8.

⁷ Appellant's Appendix, A-158.